United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

ORIGINAL

75-4266

United States Court of Appeals

FOR THE SECOND CIRCUIT

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO and NEW YORK SHIPPING ASSOCIATION, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF OF PETITIONER NEW YORK SHIPPING ASSOCIATION, INC.

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REPLY BRIEF OF PETITIONER NEW YORK SHIPPING ASSOCIATION, INC.

Preliminary Statement

Five different Answering Briefs have been filed with this Court by Respondent and by its ally Intervenors and Amicus (hereinafter collectively "Respondents").[1] Each is replete with factual inaccuracies, historical distortions and convoluted legal theories. However, each contains significant and telling concessions. These concessions clarify that the issues before this Court are pure questions of law, and they expose the errors committed by the Board in imposing unwarranted and incorrect legal principles to the undisputed facts.

First, it is admitted that the decision below relied upon the factual findings of Administrative Law Judge Arnold Ordman, simply drawing "different inferences and conclusions from the same evidence" (Board, p. 17, n. 7; 196a). Thus, this Court's appellate function herein is broad and unlimited since it must determine pure questions of law[2] involving the validity of the legal principles upon which the Board's "inferences and conclusions" rest. *NLRB* v. *Brown*, 380 U.S. 278, 292 (1965).

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[1] The individual answering briefs are referred to herein as follows:

Brief for the National Labor Relations Board	"Board, p.——"
Brief of Intervenor Twin Express, Inc.	"Twin, p. ——"
Brief of Intervenor Consolidated Express, Inc.	"Consol., p. ——"
Brief for Intervenor Truck Drivers Union Local 807, I.B.T.	"Local 807, p. ——"
Brief *Amicus Curiae* of Local 707, International Brotherhood of Teamsters	"Local 707, p. ——"

[2] Twin's disingenuous attempt to convert this proceeding into a factual confrontation, thereby circumscribing this Court's scope of review by the imposition of the substantial evidence rule (Twin, p. 69), is totally unwarranted and is conspicuously at odds with Respondent's unequivocal concession that this proceeding involves the validity of legal conclusions, not facts.

Second, Respondents concede—as they must—that the historical work of ILA longshoremen was not merely loading and unloading ocean vessels, but rather the moving of cargo piece-by-piece throughout the waterfront terminal, including the stuffing and stripping on the piers of pallets, boxes and, most significantly, containers. This basic and important concession is repeated throughout Respondents' answering briefs. For example:

—"virtually all solid cargo moving over the New York docks was handled on a piece-by-piece basis by longshoremen represented by ILA." (Board, p. 6)

—"longshoremen then placed the cargo on drafts or pallets, or into small boxes prior to loading it aboard ship." (Board, pp. 6-7)

—"longshoremen stuffed and stripped boxes and containers on the piers." (Board, p. 7)

—"cargo handling on the docks has generally been longshoremen's work." (Consol., p. 36)

—"ILA members stuffed and stripped some containers on docks." (Consol., p. 38, n. 32)

—"consolidation work that is done on-pier is that involving cargoes directly generated by ocean carriers for shipment . . . and the Board so found (197a, n. 16), that:

> 'it is clear that longshoremen have performed these functions on the piers on behalf of shippers since the advent of containerization' " (Twin, pp. 11-12)

—"ILA loaded and unloaded shipboard cargo and moved same within the confines of the pier." (Local 807, p. 5)

This oft-repeated concession explicitly depicts the nature of the traditional work of ILA longshoremen which the Rules properly seek to protect and preserve.

Third, Respondents pointedly ignore the period from 1959 to 1968 seeking to submerge those years into the "Dark Ages" of unrecorded history. This omission of the ILA's consistent claim over the work on consolidated containers, however, is an indirect concession of the signifi-

cance and relevancy of the recorded repeated efforts by ILA to enforce its 1959 bargain with NYSA that preserved for longshoremen their traditional right to handle local LTL cargo at the piers.

The fourth illuminating concession is the Respondents' failure to deny the indisputable fact that at no time did the ILA ever demand to represent employees of Consolidated, Twin or any other consolidator (Board, p. 30, n. 12).[3] In fact, compliance with the Rules is not achieved by ILA's representation of the consolidators' employees, since as this Court noted in *ICTC* even if they employed ILA labor offpier, the consolidated containers would still be subject to the Rules (426 F.2d at 889; 169a). Compliance with the Rules is achieved by simply bringing the LTL cargo to the pier loose in breakbulk form, as was done both before and after containerization (85a-89a, 1143a-1149a). It does not require a cessation of business between the ocean carriers and the consolidators contrary to Respondents' contention (Board, pp. 6, 15, 23; Twin, p. 26).

The basic and important concessions made by Respondents herein emphasize the validity of the Rules. The Rules seek to preserve for the longshoremen the physical handling of local LTL cargo being shipped on vessels of NYSA member carrier-employers of ILA labor. The Rules are addressed only to the steamship carrier em-

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[3] The true nature of a single incident in 1962, twenty years prior to the charges herein, the importance of whose occurrence Local 807 seeks to magnify (Local 807, p. 8) was never resolved (169a), since its resolution "would not be of any great significance" (169a), and was never mentioned in the Decision below. This informational picketing (116a-117a), lasting slightly more than one day (109a) when brought to the attention of ILA officials, was withdrawn since they recognized that the obligation was the ocean carrier's and was an arbitrable matter under the contract. A grievance was filed culminating in an award in favor of the ILA and against the carrier, Sea-Land, in which Sea-Land was found to have violated the NYSA-ILA contract when it did not stuff and strip the consolidated containers (385a). The conduct of the ILA establishes that the ILA looked to the shipping companies for relief (119a) and not to the consolidators, since the latter were under no contractual obligation to the ILA.

ployers of ILA labor—concededly not to the consolidators. Only the NYSA steamship carrier members can fulfill the ILA's demand since they own or control the ocean containers. The Rules thus fully satisfy the only proper and existant test laid down in *National Woodwork* since they are "addressed to the labor relations of the contracting employer vis-a-vis his own employees" (386 U.S. at 645) and are not "tactically calculated to satisfy union objectives elsewhere" (386 U.S. at 644).

In light of these telling concessions, there is no need in this Brief to refute every argument appearing in Respondents' answering briefs, many of which have been adequately dealt with in NYSA's Principal Brief. Accordingly, this Reply will be limited to a refutation of Respondents' principal and more egregious errors.

I

The precise work in controversy, which the Rules seek to protect, is the traditional physical handling and preparation of ocean cargo by ILA labor at waterfront facilities. It is this pier work that was drastically eroded by containerization. The failure to focus upon this work, as required by the governing law, was reversible error.

The fatal flaw in the Decision—repeated again and again in Respondents' answering briefs—is the erroneous definition of the work in controversy. *National Woodwork* instructs that, to properly define the work in controversy, two questions must be answered:

(1) On what bargaining unit must the analysis be focused; and,

(2) What are the work functions of that bargaining unit?

A consideration of "the remoteness of the threat of displacement by the banned product or *services*" (386 U.S.

at 644, n. 38) (*Emphasis added*) supplies the answer to Question 1. Obviously, the services, which the Rules seek to proscribe, namely off-pier loading and unloading of ocean cargo, threatens the remaining longshore jobs, and in fact, has displaced many jobs already. In *National Woodwork*, the Supreme Court painstakingly examined the "threat of displacement" by focusing on the job-site carpenters' bargaining unit protected by the work preservation clause [here, the ILA longshoremen], whose jobs were being threatened, and in fact extinguished by the technological innovations of machine-prefabricated doors [here, by containerization]. The Decision below totally ignores this elementary analysis mandated by *National Woodwork*. Instead, the Board erroneously predicates its entire decision upon a definition of the work in controversy by arbitrarily focusing, not upon the ILA bargaining unit protected by the Rules, but instead upon the offpier work which violates those very Rules.

The second basic teaching of *National Woodwork* answers Question 2. It calls for an examination of the historical work functions of the protected bargaining unit before the advent of technological innovation. This is the work that is being displaced; this is the work that the clause seeks to protect and preserve. Yet, in the Decision below, the arbitrary starting point is the post-containerization work. It is argued that while the historical work of ILA longshoremen encompassed the handling of "virtually all solid cargo moving over the New York docks on a piece-by-piece basis" (162a, 189a; Board, pp. 6-7; Local 807, pp. 3-4), this is irrelevant. This follows, it is contended, since after the advent of containerization, as to containers released by their ocean carrier-employers to off-pier consolidators, ILA longshoremen did not handle the ocean cargo going into those specific containers, although, concededly, they performed the same LTL work at the piers on the cargo going into other containers (197a; Board, p. 7).

This analysis begs the question and contravenes the teachings of *National Woodwork*. The carpenters in *National Woodwork*, after the introduction of prefit doors, performed

no work functions at the job site on those specific prefit doors except to hang them, just as the longshoremen may have only hoisted the consolidated container aboard ship. However, like the longshoremen herein, they continued to perform their traditional work of cutting and fitting other doors at the construction sites. The Supreme Court found that these prefit doors displaced the traditional carpentry work of cutting and fitting blank or unfinished doors at the job-site. It was this traditional work, performed before the advent of the prefabricated door, which the Supreme Court unequivocally held to be the work in controversy. Upholding the clause required the employer to purchase blank doors enabling the carpenters to perform their traidtional work of cutting and fitting.

The inherent error in the approach utilized in reaching the Decision below, namely that the legality of the clause is dependent upon whether the unit employee performed his traditional work on the product or service when it reached the site after the innovation was applied, is that it would lead to a finding of a violation in every case. Thus, had the Supreme Court, in *National Woodwork*, defined the work in controversy in terms of *work on the prefit doors*, it would have been impelled to invalidate the clause which prohibited the use of such prefit doors at construction sites in the Philadelphia Metropolitan area,[4] since, *ipso facto*,

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[4]Twin attempts to create out of whole clothe and to read into *National Woodwork* a principle that any *significant* adverse secondary effects on outsiders, invalidates an otherwise valid work preservation clause (Twin, pp. 55-9). Nothing could be clearer in *National Woodwork* than its unequivocal holding that a work preservation clause which encompassed the Philadelphia metropolitan area (386 U.S. at 616) is valid "*however severe the impact*" and necessary consequences thereof upon neutral third parties (386 U.S. at 627) (*Emphasis added*). This was recently reiterated again by the District of Columbia Circuit in *Enterprise Association* when it stated:

> "However, given the Supreme Court's approval of work preservation clauses in *National Woodwork*, and the policy of allowing contending parties to support their demands through economic pressures, we do not find that a work preservation action such as the one in the present case necessarily has *per se* any unlawful secondary objective, although it may have severe effect on neutral employers." (521 F.2d at 904).

the carpenters obviously did not do any work on the prefit door except install it, just as the longshoremen here only install the consolidated containers aboard ship. So too, in *American Boiler,* had the Eighth Circuit embraced the Board's test herein, instead of approving the work preservation clause as it did, it would have found it illegal since it necessarily resulted in the acquisition of the work of assembling boilers, heretofore performed by the outside boiler manufacturers, which assembly work was not done on the pre-assembled boilers at the construction sites by the pipefitters, who merely installed them.

Every judicial opinion since *National Woodwork* has been unalterably opposed to the principles sought herein to be superimposed upon the doctrine of work preservation. If the Board's Decision *sub judice* is upheld, every effective work preservation clause henceforth will be invalid since by definition it will be deemed an acquisition of work performed by employees outside of the bargaining unit after the introduction of new technology. This is not—and never has been—the law.

The work in controversy is thus not, as the Board and Respondents erroneously contend, "the LCL and LTL container work performed by Consolidated and Twin at their own off-pier premises" (196a; Board, pp. 19, 30-1; Consol., pp. 8, 36; Twin, pp. 6-7, 53-4; Local 807, p. 17). Rather, as this Court found in *ICTC,* it is the traditional longshore work of handling and preparing cargo for ocean shipment at the piers, including, both before and after containerization, "the preparation of cargo for shipment by making up, for example, drafts and pallets and sorting the cargo according to its consignees and delivering it to the trucks or other carriers" and, also including after containerization, "packing and unpacking containers . . . at the docks" (426 F.2d at 886, 889). This body of traditional ILA pier functions, which the Rules seek to protect from the threat of displacement by containerization, is the work in controversy.[5]

With the advent of containerization—a concept of cargo movement developed by NYSA carrier members—it was

now possible for a steamship carrier to erode the work functions of its ILA longshore employees by releasing its ocean container (*i.e.*, segment of its vessel) to the offpier trucker or consolidator.[6] However, the truck had now been transformed by the ocean carrier into a mobile portion of the hold of its vessel. The ILA from the outset of containerization recognized the potential threat to their members' traditional work jurisdiction if the steamship companies were allowed to release their containers to be packed and unpacked offpier by non-ILA labor (1088a). It complained that the work of preparing cargo for ocean shipment has always been performed at a waterfront terminal by ILA labor.

The large metal containers were merely a different type of receptacle, *i.e.* pallet, draft, box, etc., previously utilized

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[5] Consolidated tries to concoct the baseless theory that to be valid a work preservation clause must universally seek to preserve and protect the particular jobs of particular employees, citing *NLRB* v. *National Maritime Union*, 486 F.2d 907 (2d Cir. 1973) ("*NMU*") (Consol., pp. 47-8). *NMU* is not apposite since the single ship unit there was of a different nature and more limited than the longshore unit herein. Here, there is a portwide unit and the longshoremen cannot make a claim to any particular job since he has no particular employer. *Bey* v. *Muldoon*, 223 F. Supp. 489, 494 (E.D. Pa.), aff'd, 354 F.2d 1005 (3d Cir. 1963), cert. denied, 384 U.S. 987 (1966). Enforcing the Rules will benefit the portwide multiemployer bargaining unit ILA employees. *W. A. Boyle, United* Mine Workers (Dixie Mining Company), 179 NLRB 479 (1969). The Rules do not benefit the union in general as in *NMU* but rather all appropriate bargaining unit longshoremen.

[6] To this extent the Rules and other valid work preservation clauses are no different in purport and effect than prohibitions against subcontracting of unit work, concededly lawful work preservation (Board, p. 27). Consolidated argues that consolidators are customers, not subcontractors of the steamship carriers (Consol., p. 52, n. 43). Yet the tariff discount, or FAK rate, only available to consolidators, is in effect subcontracting. The outlandish assertion in Consolidated's brief that the FAK tariff is a "higher" freight rate is directly contradicted by the testimony of Consolidated's chief operations officer who conceded that it is a "cheaper" rate (1108a). It is cheaper because the ocean carrier is inducing the consolidator to load the carrier's container offpier at the consolidator's expense. Offpier loading, like subcontracting, results in a substantial benefit to the ocean carrier since it thereby saves wages and other direct labor costs otherwise payable to its ILA labor for pierside handling (Board, pp. 5, 15; Twin, p. 9).

abandonment in the "less than precise language" of the 1959 agreement.[18]

III

The decision below is legally incorrect. It finds no basis in existing authority.

(a) Existing Precedent Requires Approval of the Rules

In *National Woodwork* the Court posed the test of legality in terms of whether the work, against which the work preservation clause was being applied, threatened the traditional bargaining unit jobs. In upholding the clause, the Supreme Court relied upon the finding that its objective "was preservation of work traditionally performed by the jobsite carpenters" (386 U.S. at 646). The Supreme Court did not, as did the Board below, consider whether the jobsite carpenter had traditionally worked on pre-cut doors (of course, he did not).

Here, it is undisputed that the ILA's jurisdiction covers the handling of cargo at the piers, including, as conceded in the Decision below, the stuffing and stripping of some containers (197a).[19] Yet, Respondents ignore this work,

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[18] Neither the Decision below nor any of Respondents' briefs cite any judicial opinion in support of the waiver theory. There is no law—nor should there be—that the imprecise words of a labor contract, entered into when technology is in its infancy, should be construed as an irrevocable, perpetual waiver of a union's right to traditional work. This is especially true (1) when there is no showing of a conscious, knowledgeable abandonment, or any *quid pro quo* therefor, and (2) when there is a contrary contemporaneous interpretation by those administering the labor contract both verbally, and in practice. A union's claim to work should not be so lightly extinguished, nor should its right of reacquisition be so strictly limited. *See: Humphrey* v. *International Longshoremen's Ass'n*, 401 F.Supp. 1401 (E.D. Va. 1975).

[19] Respondents' reliance upon *Sheet Metal Workers Local 98* v. *NLRB*, 433 F.2d 1139 (D.C. Cir. 1970) is misplaced. In that case the items whose fabrication the union claimed as unit work, had traditionally been purchase items throughout the industry and union members had never previoulsy made the items at the job-site. Here, concededly, longshoremen currently stuff and strip containers at the piers and moreover, in the past, physically handled all ocean cargo—bar none.

urging instead that only the work of the outside employer (*i.e.*, the consolidator) is relevant.

The basic error in the Decision below, repeated in Respondent's Brief, is the failure to apply the analysis used by the Court in *National Woodwork* to the instant case.[20] This is evident in Respondent's attempt to distinguish *National Woodwork* as follows (Board, p. 31):

> "For, just as the Supreme Court there focused not upon all the carpenters' skills, but on the precise work of *hanging pre-cut* versus on-site-cut doors, the Board, here, properly limited its concern to the stuffing and stripping of consolidators' containers, for that was the work ILA claimed the right to perform. But unlike the carpenters who had *cut doors* on the site in the past, longshoremen have never stuffed containers at the piers for consolidators' customers" (*Emphasis added*).

Respondent continuously shifts the analogy to reach the desired result. The consolidated container here, is the equivalent of the pre-cut door in *National Woodwork*, not the on-site-cut door. The carpenters in *National Woodwork* had never cut pre-cut doors at the site. To rephrase the analogy correctly Respondent must admit that: "But like the carpenters who had *cut doors* on the site in the past, longshoremen have *stuffed containers* at the piers" or "But like the carpenters who had never cut *pre-cut doors* on the site in the past, longshoremen have never stuffed containers at the piers for consolidators' customers". In either case the Rules are equivalent to the will not handle clause in *National Woodwork*.[21]

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[20] The fact that a manufacturer was involved in *National Woodwork* and a supplier of services is involved here "cannot obscure the fact that for all relevant analytical purposes the situation of the two employers is identical." *Enterprise Association*, 521 F.2d at 896, n. 25.

[21] Respondent's analogy is inconsistent with the Board's Decision wherein it found the work in controversy to be the LTL container work performed by Consolidated and Twin *at their off pier prem-*

(*footnote continued on following page*)

That the test below was not the proper one, was recognized by Judge Ordman since:

> *"the legitimacy of a work preservation objective would be virtually precluded in any situation where it could be established that other employees at other sites were doing or had done the work for which protection was being sought"* (166a) (*Emphasis added*).

Respondents' attempts to distinguish *American Boiler* demonstrate the fatal flaw in the Decision below.[22] *American Boiler* is irrelevant it is urged since ". . ., here, unlike that case, ILA-labor never stuffed and stripped containers for consolidators' customers" (Board, p. 33), implying that the pipefitters installed the trim piping on pre-packaged boilers. Yet in *American Boiler,* as here, the union was objecting to the practice which limited its members to merely installing the pre-packaged boiler intact (*i.e.,* installing the consolidated container intact on the vessel) and which thereby displaced their traditional work of assembling the components of the boiler (*i.e.,* stuffing the cargo into the container). Thus, as the Court noted in *American Boiler:* "The record is clear that the trim piping, if not done by the boiler manufacturer in its plant, is done on the construction job site by pipe fitters." (404 F.2d at 553).

Here, too, if the cargo is not containerized by the consolidator offpier it would be delivered breakbulk to the pier

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(footnote continued from preceding page)
ises. Nevertheless, the Rules are valid under *National Woodwork* since:

> "But like the carpenters who had never cut pre-cut doors at the door manufacturer's plants in the past, longshoremen have never stuffed LTL containers at consolidators' offpier facilities."

[22] In *Meat and Highway Drivers,* the Board applied the same test it used below, finding a clause invalid since:

> "The work [interstate driving] which the union sought to secure for the employees in the bargaining unit was never customarily performed by such employees." (53 LRRM at 1477)

The District of Columbia Circuit reversed this improper test and upheld the clause as preserving work fairly claimable by the drivers who had only made deliveries in the local area.

where it would be containerized for ocean shipment by the longshoremen, as they do with other cargo.[23]

(b) The Cases Relied on by Respondents Are Not Controlling

(i) *Naval Supply*

The dispute was between the ILA and the U.S. Navy, whose employees, not represented by the ILA, had for over 30 years handled at the Navy's docks all types of cargo—breakbulk and container—including, after 1967, containers which were trucked to the commercial piers where the ILA represented the employees. In 1970, when the Navy rejected the ILA's demand to replace its employees with ILA members, the ILA invoked the Rules at the commercial piers to achieve its objective *vis-a-vis* the Navy. The Board found the conduct violative of Section 8(b)(4)(B) since the ILA's manifest purpose was to pressure commerical employers (the "secondary") with whom the ILA had a contract, to induce the Navy (the "primary") "to displace its own employees handling break-bulk cargo and containers at the Supply Center with ILA members" (195 NLRB at 274).

It is in this context that the Board posed the issue as to "the precise work which is the focus of the dispute." The ILA had never done the break-bulk or container work at the Navy pier. It was thus attempting to enlarge its jurisdiction. Here, however, there is no dispute between ILA and the consolidators. The ILA has never demanded that the consolidators replace their employees with ILA members. Its demand has solely been directed at NYSA members (the primary employers), to preserve that portion of their ILA employees' jurisdiction protected by the Rules.

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[23] Respondents' contention that the Rules are "make-work" is incorrect. They merely require that the work be done at the pier in the same manner that *National Woodwork* required the work to be done at the construction site. The work of loading LTL cargo into the ocean container should be done in the first instance at the pier. If it is not, the Rules then require the rehandling at the pier as a sanction designed to induce the carrier not to have it done offpier.

(ii) *Teamsters Local Union 282, IBT (D. Fortunato, Inc.), 197 NLRB 673, 80 LRRM 1632 (1972)*

Numerous suppliers and contractors employing Local 282 members went out of business. They were replaced by others not employing Local 282 members. Local 282 thereafter exacted a clause in its multi-employer labor contract which required that all driving both at and to and from construction sites be performed by its members. This clause, by its terms, had to be included in any subcontract. The Board invalidated the clause since it sought to expand Local 282's jurisdiction "in making sure subcontractors and suppliers employ Local 282 drivers. In these circumstances it cannot be found that the clause was addressed to the labor relations of the contracting employers *vis-a-vis* their own employees" (80 LRRM at 1637).

Here the Rules seek no such purpose. They are not intended to apply to any unit other than the NYSA-ILA portwide unit. They do not seek to obtain jobs in the past performed away from the piers and docks, nor are they applicable to employers who are not signatory to the NYSA-ILA contract. In fact, *Fortunato* recognized that neither Section 8(e) nor Section 8(b)(4) proscribe "agreements or conduct aimed at recapturing or reclaiming for unit employees work which they previously performed or which otherwise constitutes fairly claimable work" (80 LRRM at 1636). Here the work is demonstrably work previously and currently performed and, certainly, constitutes fairly claimable work.

(iii) *Cal Cartage*

NYSA's Principal Brief (pp. 48-49) and Judge Ordman's decision (178a-179a) expose the lack of precedential value of the decision by the Board in *Cal Cartage*. There both ILWU members and teamsters, since as early as 1953, have been engaged side by side on waterfront terminals in the "work" of preparing merchandise for loading aboard ship (208 NLRB at 1003). Here, however, such work has always been ILA work, to the exclusion of all others. There the Board found a clear and unequivocal contractual abandonment by the ILWU in 1961 in exchange for a substantial $29.5 million fund. In 1970, after a 10 year hiatus in which others did the work with no objection by ILWU, it belatedly

asserted a claim to work on consolidated containers. Here the ILA, from 1959 to the present, continued to assert its right to handle local LTL and consolidated containers at the piers. Moreover, ILA never received consideration[24] which would support a purported abandonment.

Respondents attempt to equate *Cal Cartage* and the instant proceeding urging that application of the Rules to Consolidated and Twin is equivalent to the ILWU's attempt in *Cal Cartage* to cover employers not employing ILWU labor (Board, p. 28). As in its analysis of *National Woodwork,* Respondent distorts the facts. In *Cal Cartage* the vice referred to was application of the PMA-ILWU contract to containers of shipping lines neither members of PMA nor bound by its contract with ILWU (208 NLRB at 995). Here, however, the Rules apply only to containers of employers bound by the NYSA-ILA and CONASA-ILA labor contracts.[25]

(c) ICTC—The Decision Below Is In Direct Conflict With This Court's Decision In ICTC Which Properly Applied National Woodwork and Upheld the Rules

The precedential authority of this Court's 1970 decision in *ICTC* upholding the Rules is apparent since (1) It in-

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[24] The small royalty under the 1959 agreement was never applicable and never paid on consolidated containers (See pp. 14-15 *supra*). The Guaranteed Annual Income ("GAI") was first received by ILA in 1965 (285a), six years after the 1959 agreement when it allegedly abandoned its rights, and was in exchange for gang size reduction (1011a-1017a).

[25] Respondents devote considerable effort to attempt to expand the Rules by alluding to their application over so-called "foreign containers", claiming this to be work acquisition (*e.g.*, Board, pp. 13, 15, 23; Twin, p. 24, n. 6). Respondents' efforts are love's labor lost. Every "foreign container" herein was in fact leased or controlled by the ocean carrier, *i.e.*, TTT (765a-766a) and was used by TTT for the purpose of evasion thus, subjecting these containers to the Rules (515a). Twin tries to becloud this fact by referring to the statemnet of Twin's President Nestor Sanjurjo that "he spent $25,000 renting containers" from others than TTT (Twin, p. 24, n. 6). However, Twin conventiently changes Mr. Sanjurjo's testimony. Any ocean containers Twin obtained from others was "with their [TTT's] help" (719a). As Mr. Jacobs of Consolidated candidly admitted "TTT's help" meant that "TTT acquires [the containers] from the railroad pools" (765a).

volved the same Rules;[26] (2) The Rules were applied against a consolidator (*i.e.*, ICTC); (3) The Rules' legality was determined by applying the *National Woodwork* principles; (4) The Rules satisfied *National Woodwork* since they protected the traditional work history of longshoremen in the Port.

The various attempts to avoid the controlling effect of *ICTC*, either by totally ignoring it (as did the Decision below), or by distinguishing it—albeit unsuccessfully (Respondents' Briefs)—fail completely to lessen the significance of *ICTC's* holdings for purposes of deciding the instant case.

The main trust of Respondents' arguments[27] is that *ICTC* was an anti-trust case involving different legal principles (Board, p. 43; Consol., p. 57; Twin, p. 64), in which the validity of the Rules was never before the Court. This argument is totally unfounded. In defining the controversy in *ICTC*, Judge Hays stated that it "involved certain provisions of the agreement between NYSA and ILA pertaining to the use of containers", namely the Rules (426 F.2d at 886). However, the plaintiff may have sought to frame the pleadings (in fact the complaint in *ICTC* leaves no doubt that plaintiff there, as charging parties here, challenged the Rules generally and sought to enjoin their enforcement) and whether or not it challenged the Rules *per se* openly and directly[28] (Board, pp. 43-4; Consol., p. 61; Twin, p. 66), Judge Hays made it clear

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[26] The Dublin Rules merely provided the means for effective enforcement of the Rules. They did not change the philosophy and basic principles of the Rules. Thus, Respondents' attempts to distinguish *ICTC* on the basis that it did not involve the Dublin Rules (Board, p. 44; Consol., p. 57, n. 50; Twin, p. 63) are obviously fallacious.

[27] Respondent's contention that NYSA's Brief in *ICTC* conceded that the 1968 agreement is the origin of restrictions on consolidated containers is contradicted by the very material quoted which notes the dispute, grievances and arbitrations over the issue since 1959 (Board, p. 42, n. 16). Thus it supports NYSA's contention that the origin was 1959, not 1968. (*See:* p. 12, n. 13 *supra.*)

[28] Respondents' assertion that ICTC differs from the instant case since there the Rules were not being generally challenged but only their application to a particular consolidator rings false since the very same assertion was made by Respondent (723a-724a). Nevertheless, the issue before the Board and this Court is the Rules' inherent legality as work preservation provisions.

that the validity of the Rules was the ultimate question of law decided in *ICTC*.

The starting point for the Rules' validity under labor law and anti-trust law is identical.[29] Judge Hays in *ICTC* framed the test as follows: "whether the action is in the union's self-interest in an area which is a proper subject of union concern . . ." (426 F.2d at 887). This test was fully satisfied by the Rules since "The Supreme Court has repeatedly held that the preservation of jobs is within the area of proper union concern" citing *National Woodwork* (*Id.*) and "Union activity having as its object the preservation of jobs for union members is not violative of the anti-trust laws" citing *Jewel Tea*. (*Id.*)

To uphold the Rules in *ICTC* this Court necessarily had to find what was the traditional work of the longshoremen, which it did. After reviewing the history of containerization, it went on to find that historically longshoremen prepared cargo for ocean shipment drafts and, after containerization by "packing and unpacking containers on pallets, . . . at the docks" (426 F.2d at p. 889). The Rules were thus valid since the purpose of the Rules is "to preserve for those ILA members who are employed on the docks this aspect of their traditional work" (*Id.*)[30]

Despite this clear language and the clear findings both on the facts and on the law as to the longshoremen's jurisdiction, Respondents assert *ICTC* is irrelevant. They do so even though General Counsel, in 1970 had after investigation, upheld the Rules since its object was "the preservation

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[29] To qualitfy for the anti-trust exemption it must further be shown that there was no illegal conspiracy, which this Court in *ICTC* went on to discuss. This additional factor, however its relevance under antitrust law, need not be considered herein under the Act. If the ILA's objective is a valid union concern for work preservation—which it is herein as found in *ICTC*—then the Rules must be upheld. A careful analysis of *National Woodwork* discloses that the tests for judging the validity of a work preservation clause under the antitrust laws is the same as that under the Act. In fact, it was the case law development of the antitrust test which became the basis for the labor test (386 U.S. at 619-644).

[30] In addition to this Court's finding of the ILA's traditional work jurisdiction—conceded herein—this Court in *ICTC* also noted that in the 1968 negotiations the ILA demanded that its members

(*footnote continued on following page*)

of work performed by longshoremen" . . . and "that the 'stuffing and stripping' of containers traditionally has been performed by these longshoremen" (269a-270a).

It somewhat defies comprehension that Rules applied against a consolidator in 1969, which General Counsel held to be valid work preservation rules since they sought to preserve the work jurisdiction of the ILA, no longer had this objective three years later when applied to other consolidators. Certainly, the traditional work of the ILA in 1970 was no different in 1973. It is respectfully submitted that NYSA and ILA had a right to rely on *ICTC* and General Counsel's approval of the Rules in 1970. *ICTC* and General Counsel were correct then and are correct today. Nothing herein provides a basis for reversing those dispositive precedents.

Conclusion

For all of the above reasons, the Board's Decision below is in error and should be vacated and set aside.

Respectfully submitted,

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(footnote continued from preceding page)

stuff and strip all containers. This fact demonstrates that at each contract renewal, the prior agreement did not bind the parties. Typically, a prior collective bargaining agreement does not act as a bar precluding either party from espousing and demanding a contractual result at odds with or altering the terms of the terminated agreement. Here, the ILA may have clearly abandoned claim over shipper's loads in the 1959 agreement. This negotiated compromise in 1959 did not prevent it from renewing its demand over all containers in the 1968 negotiations. Similarly, NYSA was not precluded by this same 1959 compromise wherein it may have agreed to the pierside stuffing and stripping of local LTL and consolidated containers from demanding in 1968 that all containers move without restriction. The 1968 negotiating positions of NYSA and ILA, however, did not reflect the terms of the 1959 agreement, Respondents notwithstanding (Board, p. 10; Consol., p. 21). They were an offer or "a technique of bargaining" (1057a-1060a) and did not constitute an exposition of the meaning of the 1959 agreement.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 75-4266

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO and NEW YORK SHIPPING ASSOCIATION, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

TWIN EXPRESS, INC., and CONSOLIDATED EXPRESS, INC., TRUCK DRIVERS UNION LOCAL NO. 807,

Intervenors.

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of March, 1976, two (2) copies of the Reply Brief of Petitioner New York Shipping Association, Inc., were served by regular United States mail, postage prepaid, on the following counsel for all parties of record:

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